

Opinion issued June 2, 2016



In The  
**Court of Appeals**  
For The  
**First District of Texas**

---

NO. 01-15-00887-CV

---

**FARHA RASHEED, Appellant**  
V.  
**TEXAS FAIR PLAN ASSOCIATION, Appellee**

---

**On Appeal from the 268th District Court  
Fort Bend County, Texas  
Trial Court Case No. 13-DCV-205335**

---

**MEMORANDUM OPINION**

Appellant Farha Rasheed appeals the trial court's rendition of summary judgment in favor of Texas Fair Plan Association ("TFPA") and the trial court's denial of her motion for a new trial. Rasheed brought contractual and extra-contractual claims against TFPA, her insurer, following a dispute over the extent of

damages to her home after a storm. Five days before trial, TFPA moved for summary judgment and leave to shorten the 21-day notice period for the same. The trial court granted leave to shorten the notice period, considered the merits of TFPA's summary-judgment motion, and granted summary judgment in favor of TFPA on all claims. Rasheed filed a motion for a new trial, which was denied by operation of law. We affirm.

### **Background**

In January 2012, Rasheed's home was damaged in a storm. On March 7, 2012, Rasheed reported the claim to TFPA, her insurer. Two days later, TFPA inspected the property and determined that the damages sustained were below Rasheed's \$6,140 policy deductible. In December 2012, Rasheed sued TFPA, alleging contractual and extra-contractual claims.

On November 23, 2014, TFPA invoked the appraisal process provided for under the policy.<sup>1</sup> Rasheed's appraiser and TFPA's appraiser signed the appraisal

---

<sup>1</sup> The appraisal provision of Rasheed's TFPA policy provides:

If you and we fail to agree on the actual cash value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal. Each will then select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item.

award on July 1, 2015, and July 6, 2015, respectively. Four days later, on July 10, 2015, TFPA issued a check to Rasheed for the appraisal award, less depreciation and deductible.

On July 15, 2015, TFPA filed an unopposed motion for continuance of the impending trial date, explaining that owing to payment of the appraisal award, the case was not ready to proceed to trial. On Friday, July 17, 2015, the trial court denied TFPA's requested continuance and advised the parties that the case would proceed to trial as scheduled on Tuesday, July 21, 2015.

That same day, TFPA moved for summary judgment and for leave to shorten time to notice its summary-judgment motion for hearing. TFPA argued that it was entitled to judgment as a matter of law on Rasheed's contract claim because it timely paid the appraisal award and that Rasheed's extra-contractual claims necessarily failed because she suffered no injury independent of her contract claim. It further argued that the trial court should shorten the notice requirement and consider its summary-judgment motion in the interest of judicial expediency. TFPA asserted that arguments in its motion only accrued upon payment of the

---

If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of the loss. Such award shall be binding on you and us.

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

appraisal award on July 10, 2015, and that Rasheed would be neither surprised nor prejudiced by shortened notice.

On Saturday, July 18, 2015, Rasheed electronically filed responses to TFPA's summary-judgment motion and its request for leave to shorten the summary-judgment notice period. Rasheed argued that the trial court should not shorten the 21-day notice period for hearing TFPA's summary-judgment motion because TFPA failed to show good cause for not moving for summary judgment earlier. Rasheed asserted that TFPA could have moved for summary judgment as soon as it invoked the appraisal process or, at the latest, on the day the appraisal award issued—July 6, 2015. Substantively, Rasheed argued that her claims could be maintained despite payment of the appraisal award.

On Tuesday, July 21, 2015, the trial court granted TFPA's requested leave to shorten the notice period for the summary-judgment hearing and proceeded to hear argument from both parties. At the close of the hearing, the trial court granted summary judgment in favor of TFPA on all claims. Rasheed subsequently moved for a new trial, arguing that the trial court erred by not affording adequate notice of the summary-judgment hearing. Rasheed's motion for a new trial was denied by operation of law, and this appeal followed.

## Leave to Shorten Notice of Summary-Judgment Hearing

In her second issue, Rasheed contends that the trial court erred in granting TFPA's motion for leave to shorten the usual 21-day notice period for summary-judgment hearings because TFPA failed to show good cause for not timely filing its motion.<sup>2</sup>

### A. Standard of Review and Applicable Law

Ordinarily, a motion for summary judgment must be filed and served at least 21 days before the time specified for the hearing. TEX. R. CIV. P. 166a(c). In turn, the nonmovant's response must be filed no later than seven days before the hearing. TEX. R. CIV. P. 166a(c). "The notice provisions of Rule 166-A are intended to prevent judgment without the opposing party having a full opportunity to respond on the merits." *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). "Because summary judgment is a harsh remedy, Rule 166-A must be strictly construed, including its notice provisions." *Id.*

However, Rule 166a also endows the trial court with discretion to allow filings that do not conform with the default notice requirements. TEX. R. CIV. P. 166a(c) (providing that 21-days' notice is required, "except on leave of court"); *see also City of Dallas v. Cont'l Airlines, Inc.*, 735 S.W.2d 496, 500 (Tex. App.—

---

<sup>2</sup> Rasheed does not challenge the merits of the trial court's summary judgment.

Dallas 1987, writ denied) (“Rule 166-A provides that leave of court will permit filings even though not within the time requirements.”). “It lies within the sound discretion of the trial court whether to accept or to consider late filings pursuant to [Rule 166a].” *Mowbray v. Avery*, 76 S.W.3d 663, 688 (Tex. App.—Corpus Christi 2002, pet. denied). A trial court abuses its discretion only when it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

“If a party receives notice that is untimely, but sufficient to enable the party to attend the summary judgment hearing, the party must file a motion for continuance and/or raise the complaint of late notice in writing, supported by affidavit evidence, and raise the issue before the trial court during the summary judgment hearing.” *In re Estate of Snow*, No. 12-11-00055-CV, 2012 WL 3793273, at \*2 (Tex. App.—Tyler Aug. 30, 2012, no pet.) (mem. op.) (citing *May v. Nacogdoches Mem’l Hosp.*, 61 S.W.3d 623, 626 (Tex. App.—Tyler 2001, no pet.)). Failure to provide 21-days’ notice must further be raised by a motion for new trial and requires a showing of harm. *Tivoli Corp. v. Jewelers Mut. Ins. Co.*, 932 S.W.2d 704, 710 (Tex. App.—San Antonio 1996, writ denied) (citing *Davis v. Davis*, 734 S.W.2d 707, 712 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.)); *see, e.g., Williams*, 724 S.W.2d at 417 (concluding appellant harmed by

inadequate notice of summary judgment hearing where opposing party announced ready for trial in November, then served 132-page motion for summary judgment containing new evidence two days before Christmas). Failure to provide the nonmovant with a full 21-days' notice of a summary-judgment hearing does not present a jurisdictional problem. *Tivoli Corp.*, 932 S.W.2d at 710 (citing *French v. Brown*, 424 S.W.2d 893, 894–95 (Tex. 1967)); *Davis*, 734 S.W.2d at 712 (“[A]n allegation that a party received less notice than required by statute does not present a jurisdictional question . . .”).

## **B. Analysis**

Rasheed contends that the trial court erred in granting TFPA's motion for leave to shorten Rule 166a's 21-day notice period because TFPA failed to show good cause for not timely filing its summary-judgment motion. Rasheed further asserts that she was harmed because she had insufficient time in which to present a “proper response” to TFPA's motion for summary judgment, but she does so without specifically identifying further argument or evidence that would have been offered had she been afforded more time.

We begin by noting that—contrary to Rasheed's arguments—TFPA could not have filed its motion for summary judgment as soon as it invoked the appraisal process. TFPA argued that it was entitled to judgment as a matter of law on Rasheed's contractual and extra-contractual claims because the parties completed

the appraisal process provided for under the contract and TFPA paid the appraisal award. Because defenses based on appraisal arise only after an appraisal award is paid, TFPA's grounds for summary judgment did not arise until after it paid Rasheed the appraisal award on July 10, 2015. *See Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, No. H-09-3479, 2011 WL 819491, at \*3 (S.D. Tex. Mar. 2, 2011) ("A plaintiff . . . is estopped from pursuing a breach of contract claim not by the issuance of the appraisal award. Instead, the plaintiff is estopped only where, as here, the plaintiff **accepts payment** of the appraisal amount from the insurer.").

Five days after the grounds for its summary judgment arose, TFPA requested a continuance and explained that, owing to payment of the appraisal award, the case was not ready to proceed to trial. The trial court denied the requested continuance on July 17, 2015, and TFPA moved for summary judgment and leave to shorten the 21-day notice period that same day. This procedural record reflects diligence more than delay.

On the following day, Rasheed filed a 17-page response. Rasheed responded without seeking further discovery or requesting a continuance, and the trial court considered Rasheed's response. Though Rasheed did object to the shortened notice in writing and raised her objections during the hearing, Rasheed failed to support her objection with affidavit evidence explaining why she needed



more time. *See In re Estate of Snow*, 2012 WL 3793273, at \*3 (concluding appellants not harmed by shortened notice where they failed to explain why they needed more time to file response); *Mowbray*, 76 S.W.3d at 688 (concluding appellant waived complaint of shortened notice by failing to file affidavit explaining how she was prejudiced). Nor has Rasheed identified any evidence that she was unable to present as a result of the shortened notice period. *Cf. Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 26 (Tex. App.—Houston [14th Dist.] 1994, no writ) (concluding that trial court failed to give sufficient notice when it ordered nonmovant to respond to summary judgment in two days where nonmovant complained of short notice and supported that complaint with an affidavit explaining that proof needed to refute motion could not be obtained within that two-day period). Because the trial court considered Rasheed’s response and Rasheed has not explained what further argument or evidence might have been offered had she been afforded more time, she did not meet her burden to show she was harmed by the shortened notice period. *See Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (concluding failure to afford nonmovant adequate notice of summary judgment hearing was harmless error where trial court considered nonmovant’s response and nonmovant did not show he was unable to fully respond); *Williams*, 724 S.W.2d at 417 (explaining notice

provisions of Rule 166a are intended to afford nonmovant an opportunity to respond on merits).

Accordingly, we conclude that the trial court did not err in granting TFPA's motion for leave to shorten the notice period, and we overrule Rasheed's second issue.

### **Motion for New Trial**

In her first issue, Rasheed argues that the trial court erred in denying her motion for new trial because it erred in entering summary judgment without giving her the benefit of Rule 166a's 21-day notice period. Having concluded that the trial court did not err in granting TFPA's motion for leave to shorten the 21-day notice period, we likewise conclude that the trial court did not err in denying Rasheed's motion for a new trial. Accordingly, we overrule Rasheed's first issue.

### **Conclusion**

We affirm the trial court's judgment.

Rebeca Huddle  
Justice

Panel consists of Justices Keyes, Brown, and Huddle.